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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-723

ADAMS COUNTY BOARD OF SUPERVISORS, SAMUEL L. CAUTHEN, A. BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER and E. A. REDD, members of the Adams County Board of Supervisors,

Petitioners,

versus

REVEREND LEON HOWARD and BARNEY SCHOBY, individually and on behalf of all others similarly situated,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

OPINIONS BELOW 1

STATEMENT 2

ARGUMENT 10

I. The Petition Is Untimely 10

II. The Order of the Court of Appeals Is Clearly Correct, and Presents No Conflict of Decision or Important Questions of Federal Law 12

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Abate v. *Mundt*, 403 U.S. 182 (1971) 12

Burns v. *Richardson*, 384 U.S. 73 (1966) 12

Connor v. *Williams*, 404 U.S. 549 (1972) 15

Drum v. *Seawell*, 249 F. Supp. 877 (M.D.N.C. 1965), *aff'd* 383 U.S. 831 (1966) 15

Fairley v. *Patterson*, decided sub nom. *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969) .. 3, 4, 13

Georgia v. *United States*, ____ U.S. ____, 36 L. Ed.2d 472 (1973) 15

Hadnott v. *Amos*, 394 U.S. 358 (1969) 14

Hall v. *Issaquena County Bd. of Supervisors*, 453 F.2d 404 (5th Cir. 1971) 14

Howard v. *Adams County Bd. of Supervisors*, No. 73-770, docketed Nov. 13, 1973 10

TABLE OF AUTHORITIES (Continued)

Page

Keller v. *Gilliam*, 454 F.2d 55 (5th Cir. 1972) 14

Louisiana v. *United States*, 380 U.S. 145 (1965) 13

Mann v. *Davis*, 238 F. Supp. 458 (E.D. Va. 1964), *aff'd sub nom. Hughes* v. *WMCA*, 379 U.S. 694 (1965) 15

Moss v. *Burkhart*, 220 F. Supp. 149 (W.D. Okla. 1963), *aff'd sub nom. Williams* v. *Moss*, 378 U.S. 558 (1964) 14

Smith v. *Paris*, 386 F.2d 979 (5th Cir. 1967) 14

Taylor v. *Monroe County Bd. of Supervisors*, 421 F.2d 1038 (5th Cir. 1970) 14

Toombs v. *Fortson*, 241 F. Supp. 65 (N.D. Ga. 1965), *aff'd*, 384 U.S. 210 (1966) 14

United States v. *Mississippi*, 380 U.S. 128 (1965) 13

Whitcomb v. *Chavis*, 403 U.S. 124 (1971) 12

White v. *Regester*, ____ U.S. ____, 37 L.Ed.2d 314 (1973) 13

Statutes

28 United States Code § 2101(c) 10, 11

42 United States Code § 1973c 4

Miss. Code Ann. § 2870 4

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OPINIONS BELOW

The Order of the Court of Appeals requiring a special election for supervisors after approval of a constitutionally acceptable redistricting plan was entered July 29, 1971, and is attached to the Petition (App. 2, A43-A44). This Order merged with the

final decision of the Court of Appeals rendered January 6, 1972, 453 F.2d 455 (5th Cir. 1972) (App. 4, A46-A52), and this Court declined to review that decision on a petition filed by the respondents here, 407 U.S. 925 (1972).

STATEMENT

As we shall more fully discuss *infra*, this Petition, by which petitioners seek to relitigate the propriety of the Court of Appeals' July 29, 1971 Order, is untimely, and that Order, rendered to effectuate respondents' rights to election of members of a county governing board from districts equal in population, was clearly correct as a matter of law, presents no conflict either with the decisions of this Court or with the decisions of other Circuits, and does not present any substantial Federal question.

Respondents, two Black registered voters (Rev. Howard was also an unsuccessful supervisor candidate in the 1971 elections) in Adams County, Mississippi, filed their complaint on May 5, 1971, against the petitioners under the Federal equal voting rights statutes and the Fourteenth and Fifteenth Amendments to the United States Constitution seeking invalidation of the petitioners' November 2, 1970 county redistricting plan for (1) racial discrimination against Black voting strength, and (2) malapportionment of population among the five Adams County supervisors' districts, which serve as election districts for members of the Board of Supervisors, the county governing board.

Although Adams County is 47.9 percent Black, no Blacks have been elected to the all-white Adams County Board of Supervisors since Reconstruction (if then) because the political processes leading to nomination and election of public officials were closed to Blacks and because Blacks have been denied equal opportunities to participate in the political processes and to elect public officials of their choice as a result of voter registration dicrimination and franchise dilution. In its opinion of July 20, 1971 (on which the July 29 Order of the Fifth Circuit was based) (App. 1), the District Court specifically found: "Prior to the passage of the Voting Rights Act of 1965, qualified Black voters in Adams County, Mississippi were substantially disfranchised; however, after its passage a substantial number of Blacks therein registered to vote . . ." (App. 1, A9).

The effectiveness of the votes of the newly enfranchised Black voters was then cancelled out when, shortly after the passage of the Voting Rights Act, the Mississippi Legislature in the spring of 1966 enacted a statute (Act of May 27, 1966, ch. 290, [1966] Gen. Laws Miss 374, amending Miss. Code Ann. § 2870) permitting boards of supervisors to switch from district supervisors elections, the traditional method, to at-large, countywide elections, and shortly thereafter the all-white Adams County Board ordered such a switch from district to at-large elections for the 1967 county supervisors elections (Petition, pp. 3-4, App. A10-A13). The District Court further found that in 1969 this Court in *Fairley* v. *Patterson*, decided sub nom. *Allen* v. *State Bd. of Elections*, 393 U.S. 544, held

that the 1966 amendment to Miss. Code Ann. § 2870 was a change in election procedures required to be cleared pursuant to § 5 of the Voting Rights Act, 42 U.S.C. § 1973c (App. A12), and that as a result the Adams County Board, the defendants in *Marsaw* v. *Patterson* (one of the cases consolidated with *Fairley* v. *Patterson* when it reached this Court), was enjoined from holding at-large county supervisors elections unless and until the required Section 5 clearance of the authorizing statute had been obtained (App. A13).

When the Mississippi Attorney General submitted the amendment to the United States Attorney General for clearance, an objection was lodged (App. A13) on the ground that "this amendment had as its purpose and effect the denial or abridgment of the right to vote on account of race and color" (App. A7)

Petitioners correctly point out that although this Court in *Allen* held that the proposed change was required under Section 5 to be cleared by Federal authorities prior to implementation, this Court declined (5-3) to set aside the 1967 county supervisors elections held under the amendment because the Section 5 coverage questions presented "involve complex issues of first impression — issues subject to rational disagreement." 393 U.S. at 572.

The District Court's findings further reveal that the votes of Adams County blacks were further diluted by the fact that the only district to gain a Black voting majority after the passage of the Voting Rights

Act (District 4) was severely malapportioned and underrepresented, being twice the norm (App. 1, A14).

The method chosen by Comprehensive Planners, Inc. (CPI), the Board's planning agent, for distributing the population among the five districts in the November 2, 1970 redistricting plan was, according to the Record and the District Court's findings, both racially oriented and completely defective in terms of accuracy. During March, 1970 (at the same time the 1970 Census was being taken),[1] CPI identified each of the occupied houses in Adams County by land section according to the race of the occupants, and then estimated the population of each land section, by race, not by a population count but by multiplying the number of houses for whites and non-whites in each land section by a racially differentiated "house occupancy factor" (different for whites and nonwhites) based on 1960 Census house occupancy data (App. A15-A16). The factors used, according to the District Court opinion, were "3.3 Whites per house and 3.6 Non-whites per house in the City of Natchez, and 3.8 Whites and 4.6 Non-whites per house in the rural area" (App. A16). The new proposed district lines then were drawn onto a racially-designated house count map to distribute population among the five districts.

However, when the results of the 1970 Decennial Census of Population became available in February or

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[1]In the redistricting plan, CPI purported to state the population for Adams County, and for the five proposed districts, "on April 1, 1970" (Redistricting Plan, p. 3), the precise date of the 1970 Decennial Census.

March of 1971, the 1970 Census showed that CPI had erred considerably both in estimating the 1970 population for Adams County (error of 6.4 percent) and in estimating the population in each of the five districts whose boundaries were determined by the redistricting plan (App. A16-A17). The Record shows that CPI mis-counted the number of occupied houses in the City of Natchez, where almost 50 percent of the county population resides, by 424 houses (CPI found only 2,763 non-white occupied houses and only 3,103 white occupied houses in Natchez, while the Census found 2,970 non-white occupied and 3,324 white occupied houses), and that the "house occupancy factors" used, based on 1960 Census house occupancy data, were as much as 14 percent off from the 1970 Census data.

As a result, using 1970 Census data, the District Court found that three of the districts in the Board's 1970 redistricting plan deviated from population equality by a variance of 10 percent or more. District 1 was found to be overrepresented by a variance of −12.03 percent, and Districts 3 and 5 were found to be underrepresented by variances of +10.12 and +10.01 percent from the norm, for a total span of 22.15 percentage points of variance and a ratio of 1.252 to 1 between the largest and smallest districts (App. A17, A36). Although the District Court found that "the plaintiffs have failed to meet this burden of proving that the new district lines were drawn by or for the defendants on racial lines or that the defendants or CPI were motivated by considerations of race, creed or country of origin in creating the new districts" (App. A24), the

District Court did hold that "the 22.15% deviation from equality present herein, based on the 1970 Census data, does not in this Court's opinion pass constitutional muster under the one-man, one-vote equal protection provision of the Fourteenth Amendment to the United States Constitution" (App. A36).

The District Court ordered the Board to present, on or before December 1, 1971, a constitutionally acceptable redistricting plan based on the 1970 Census figures which equalized population among the districts (App. A41), but denied plaintiffs' request for an injunction against holding the 1971 county elections on the basis of the unconstitutional districts, inter alia, because the qualification deadline for candidates had passed, the date for the first primary was fast approaching, and hurried, last minute changes would confuse the voters (App. A37-A40).

The District Court rendered its final decision on July 20, 1971. Plaintiffs filed their notice of appeal to the Fifth Circuit the next day, and subsequently thereafter filed with the Fifth Circuit a motion for injunction pending appeal with a supporting memorandum and exhibits requesting that the Board be enjoined from using the unconstitutional November 2, 1970 redistricting plan in the 1971 county elections and that the 1971 elections be held on the basis of the old (pre-1970) districts or, in the alternative, that the 1971 county elections be stayed pending submission and approval of a constitutionally acceptable redistricting plan. Plaintiffs also requested alternatively that they be allowed an expedited hearing on their appeal.

The respondents' contention that they were denied a hearing (Petition, p. 12) is entirely without foundation. Respondents filed their own notice of appeal contesting the finding that their redistricting plan was unconstitutional for malapportionment. They also filed a 3-page Answer to the motion for injunction pending appeal and an 11-page supporting Memorandum Brief in which they argued that plaintiffs would suffer no "irreparable injury" by the timely holding of the 1971 county elections on the basis of the unconstitutional plan, that the decision of the District Court refusing to stay the elections was within its discretion, that the plan was not racially discriminatory, and that the District Court erred in finding the plan unconstitutional.

The July 29, 1971 Order (App. 2, A43-A44), rendered by a three-judge panel of the Fifth Circuit, steered a middle course and rendered substantial justice to both sides. Plaintiffs' motion for an injunction to hold the 1971 county elections on the basis of the pre-1970 districts, to stay the 1971 county elections, or to expedite the appeal was denied. The District Court's order requiring the Board to formulate a constitutionally acceptable redistricting plan was to remain in full force and effect, subject only to the modification that upon approval by the District Court of a constitutionally acceptable plan, not later than May 16, 1972, the District Court was to order a special election on a district basis for the election of new supervisors who were to assume office 30 days after elected. Plaintiffs' contention that the November 2, 1970 plan discriminated against Black voting strength was, in the absence of the record, reserved for consideration when the case

was finally submitted to the court for hearing on the merits.

On January 6, 1972, the Fifth Circuit affirmed the decision of the District Court (App. 4, A46-A52), both on plaintiffs' contentions that the 1970 redistricting plan constituted a gerrymander of Black voting strength, and on the Board's contentions that the District Court erred in invalidating the plan for unconstitutional deviations from population equality. The January 6, 1972 panel considered that the issue of new elections had been disposed of by the court in its July 29, 1971 Order (App. 4, A47, n. 1). But even if the July 29, 1971 Order can be characterized as an "interlocutory order," as petitioners do, then that Order merged with the January 6 judgment, and became the final judgment of the Court of Appeals.

The Board (petitioners here) neither petitioned the Fifth Circuit for a rehearing nor petitioned this Court for a writ of certiorari to contest the July 29, 1971 Order of the Fifth Circuit, merged with its January 6, 1972 decision, requiring new elections. The plaintiffs petitioned the Fifth Circuit for a rehearing on the racial gerrymandering issue, and when that was denied, filed a petition for a writ of certiorari in this Court (No. 71-1406, O.T. 1971), which the Board opposed, and which was denied. 407 U.S. 925 (1972).

Thus, when the District Court, upon finding that the Board's second redistricting plan adopted November

24, 1971[2] met constitutional requirements and equally distributed the population of Adams County among the five districts, ordered a special supervisors election to be held in conjunction with the Congressional elections on November 7, 1972, (App. 5, A66-A67), it was merely carrying out the final judgment of the Court of Appeals, and the Court of Appeals on the second appeal and cross-appeal, in the absence of any significant change in the facts or the law, had no authority to modify that judgment (App. 6, A73). Because of stay orders issued by both the District Court and by the Court of Appeals, that special election, ordered by the District Court to be held on November 7, 1972, has not yet been held.

ARGUMENT

I. The Petition Is Untimely

28 U.S.C. § 2101(c), limiting the time within which a petition for a writ of certiorari may be filed, provides:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may ex-

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[2]This second redistricting plan is the subject of a timely petition for a writ of certiorari in *Howard v. Adams County Bd. of Supervisors*, No. 73-770, docketed Nov. 13, 1973.

tend the time for applying for a writ of certiorari for a period not exceeding sixty days."

The "sole question" presented in the Petition is "the propriety of the order of the Court of Appeals directing that, upon completion of the administrative details of implementing a new county redistricting plan, each of the five seats on the Board of Supervisors be filled by special election conducted under the Court-approved redistricting plan . . ." (Petition, p. 3). That "order" was rendered July 29, 1971 (App. 2 to the Petition, A43). Since it is a "decree in a civil action" which petitioners intend "to bring . . . before the Supreme Court for review," their failure to file their Petition within 90 days "after entry of such . . . decree," no extension having been granted or applied for, makes their Petition now, filed more than two years after entry of the order, out of the time limitations imposed by 28 U.S.C. § 2101.

Even if the July 29, 1971 Order can be considered interlocutory, at the most it must have merged with the Fifth Circuit's January 6, 1972 judgment, and the Petition still is untimely. Sound judicial administration, as well as the provisions of § 2101(c), militate against permitting parties to continue to raise an issue decisively settled early in the litigation again at every subsequent stage, without any significant change in the facts or law, in the hopes that years later they might be able to remedy their early failure to seek review in this Court by attempting to petition for review of some later decision holding that the matter already had been settled.

II. The Order of the Court of Appeals Is Clearly Correct, and Presents No Conflict of Decision or Important Question of Federal Law.

The decision of the District Court, affirmed by the Fifth Circuit (and for which review was not sought by the Board), (1) holding that the Board's November 2, 1970 redistricting plan containing three districts with population deviations greater than 10 percent, and a span of deviations of 22.15 percentage points, failed to meet constitutional equal population requirements and (2) requiring that the Board devise a new, constitutionally acceptable plan, clearly was correct. *Burns* v. *Richardson*, 384 U.S. 73, 90-93 (1966) (alternative basis of apportionment valid only if "not substantially different from that which would have resulted from the use of a permissible population basis"); *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971) (invalidating state legislative redistricting providing deviation spans of 24.78% and 28.20%); *Abate* v. *Mundt*, 403 U.S. 182 (1971) (deviation of 11.9% tolerated as a maximum). The deviations present in the plan were not justified as necessary to any compelling governmental need; the petitioners' planning agents simply miscalculated.

The only real question then presented, if the Petition can be considered at all, is whether the Court of Appeals was correct in ruling that these plaintiffs should not be required to await the expiration of the supervisors' four-year terms, until January, 1976, before their constitutional right to elections based on districts equal in population could be vindicated.

In rendering its decree, the Fifth Circuit had before it findings of fact by the District Court showing that at least in this century Adams County voters, and particularly Adams County Blacks, had never been able to participate in elections which fully conformed to the Constitution and laws of the United States. Prior to the passage of the Voting Rights Act of 1965, qualified Black voters "were substantially disfranchised." See, *United States* v. *Mississippi*, 380 U.S. 128 (1965). Members of the all-white Board of Supervisors elected in the 1967 county elections, the first since the passage of the Voting Rights Act, were elected under an at-large, countywide scheme which this Court in 1969 held violative of rights conferred by Section 5 of the Voting Rights Act of 1965, *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969), and which the Department of Justice subsequently concluded was racially discriminatory both in purpose and effect. The District Court refused to stay the 1971 county elections, but ordered that they go forward under a redistricting plan which unconstitutionally debased and diluted the voting strength, not only of Blacks, but all the qualified voters of Adams County.

On these facts showing that Blacks had been denied access to the political processes and equal opportunities to elect public officials of their choice, the Fifth Circuit was under a constitutional duty to render a decree promptly and effectively to remedy the effects of past and present discrimination. *White* v. *Regester*, ___ U.S. ___, 37 L.Ed.2d 314, 326 (1973); *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). The decree struck the proper balance between disruption of the

impending 1971 county elections and delaying the vindication of respondents' constitutional rights for four more years.

The remedy of ordering a special election, shortening the terms of office of officials elected under an unlawful election scheme, and providing for the election of new officials once the legal defect (malapportionment) had been removed, as fully in accord with the practice of the Fifth Circuit in other similar cases, e.g., *Keller* v. *Gilliam*, 454 F.2d 55 (5th Cir. 1972); *Hall* v. *Issaquena County Bd. of Supervisors*, 453 F.2d 404 (5th Cir. 1971) (Order of July 29, 1971); *Taylor* v. *Monroe County Bd. of Supervisors*, 421 F.2d 1038 (5th Cir. 1970); *Smith* v. *Paris*, 386 F.2d 979 (5th Cir. 1967). Further, the Fifth Circuit also has observed that

> "the Mississippi courts have . . . not been averse to the requiring of a new election when defects have necessitated the invalidating of the regularly scheduled election. See Ulmer v. Currie, 245 Miss. 285, 147 So.2d 286; Wallace v. Leggett, 248 Miss. 121, 158 So.2d 746; and Hayes v. Abney, 186 Miss. 208, 188 So. 533." Taylor v. Monroe County Bd. of Supervisors, supra, at 1042.

Under these circumstances, the Court of Appeals had the discretionary authority to order new elections, and this Court has fully affirmed that authority and has affirmed similar orders in several cases, *Hadnott* v. *Amos*, 394 U.S. 358 (1969); *Toombs* v. *Fortson*, 241 F. Supp. 65, 71 (N. D. Ga. 1965), *aff'd* 384 U.S.

210 (1966); *Drum* v. *Seawell*, 249 F. Supp. 877, 881-82 (M.D.N.C. 1965), *aff'd* 383 U.S. 831 (1966); *Mann* v. *Davis*, 238 F. Supp. 458 (E.D. Va. 1964), *aff'd sub nom Hughes* v. *WMCA*, 379 U.S. 694 (1965); *Moss* v. *Burkhart*, 220 F. Supp. 149 (W.D. Okla. 1963), *aff'd sub nom. Williams* v. *Moss*, 378 U.S. 558 (1964).

The cases relied upon by petitioners do not deny that authority — in fact they affirm it — but hold only that on balance in certain circumstances not presented here new elections are inappropriate. In *Allen*, supra, novel questions were presented; no novel questions were presented here. In both *Connor* v. *Williams*, 404 U.S. 549 (1972), and *Georgia* v. *United States*, ____ U.S. ____, 36 L.Ed.2d 472 (1973), new legislative elections would have been required throughout the entire state, with enormous expenditures of time and money, while here new elections have only been ordered in a single county in which expenditures of time and money will be considerably smaller.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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